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No. 82-1832

In the Supreme Court of the United States

OCTOBER TERM, 1982

TOWN OF HALLIE, TOWN OF SEYMOUR, TOWN OF UNION and TOWN OF WASHINGTON,

Petitioners,

v.

CITY OF EAU CLAIRE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

56pl

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QUESTIONS PRESENTED

The Court of Appeals ruled that the City's anticompetitive conduct was exempt from the Sherman Act relying on its formulation of the *Parker* v. *Brown* test. The questions presented on this petition are:

1. If a state statute permits a city to engage in conduct which, under some circumstances, may be anticompetitive in violation of the Sherman Act, is it proper for the court to assume the state contemplated such anticompetitive conduct and infer that the state condones it?

2. If it is proper under circumstances identified in question one for the court to infer that the state condones certain anticompetitive conduct, is this inference sufficient to meet the "clearly articulated and affirmatively expressed" state policy test defined by this Court?

3. Does the fact that a person engaging in anticompetitive conduct is a municipality eliminate the requirement that the anticompetitive conduct be "actively supervised by the state"?

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The petitioners, Town of Hallie, Town of Seymour, Town of Union and Town of Washington ("Towns") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered February 17, 1983.*

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* The named parties are the only parties to this litigation.

OPINION BELOW

The Opinion and Judgment of the Court of Appeals, not yet reported, appears in Appendix A to this Petition. The decision rendered by the United States District Court for the Western District of Wisconsin on respondent's motion for summary judgment appears in Appendix B. The Judgment appears in Appendix C.

JURISDICTION

The Opinion and Judgment of the Court of Appeals for the Seventh Circuit was entered on February 17, 1983. This Petition for a Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

This case concerns the intended scope of the Sherman Act, specifically Section 1, 15 U.S.C. §2 (1980), and Wisconsin Statutes §66.069(2)(c) (1979) and §144.07(lm) (1979). These statutes are set forth in Appendix D.

STATEMENT OF THE CASE

This petition arises from the district court's dismissal of the complaint filed by the petitioners, the Towns of Hallie, Seymour, Union and Washington, in *Town of Hallie, Town of Seymour, Town of Union and Town of Washington* v. *City of Eau Claire*, Civil Action No. 80-CV-527 (W.D. Wis.), an action filed by the Towns on October 6, 1980. The Towns' complaint alleges that the City was monopolizing interstate commerce in the sale of sewage collection and transportation services in violation of Section 2 of the Sherman Act, 15 U.S.C. Section 2.

The Towns' complaint alleges that the City constructed a regional sewage treatment facility with federal funds. Although this facility is located within the City and is owned and operated by the City, it was designed and intended to serve the geographic region consisting of the City and the Towns. This facility is the only sewage treatment facility in the market available to the Towns and, as a result, the City enjoys a monopoly in the market for sewage treatment services in the geographic market in which the Towns are located.

The Towns are actual or potential competitors with the City in the market for sewage collection and transportation services in the geographic market in which the Towns are located and in which the City holds a monopoly over sewage treatment services. However, the Towns can sell sewage collection or transportation services only if they can purchase treatment services from someone else.

The City's anticompetitive conduct in violation of the Sherman Act is the monopolization of collection and transportation services in the Towns. The City offers to sell such services, as well as treatment services, to persons located in the Towns but refuses to sell treatment services to the Towns. By refusing to sell treatment services to the Towns, the City has prevented the Towns from competing with the City in the markets for collection and transportation services. Since the Towns have no means of disposing of the sewage other than the City's facility and since the City will not sell them treatment service, the Towns cannot collect sewage and have no place to which to transport it. The result is the City has monopolized collection and transportation services by its use of its monopoly power in treatment services.

On April 5, 1982, the District Court dismissed the Towns' complaint. Relying upon *Parker* v. *Brown*, 317 U.S. 341 (1943), *Community Communications Company* v. *Boulder*, 455 U.S. 40 (1982) and *California Retail Liquor Dealers* v. *Midcal Aluminum*, 445 U.S. 97 (1980), the District Court ruled that the City's conduct was exempt under the *Parker* v. *Brown* test. This resulted in a final judgment of the same date which was appealed to the Seventh Circuit.

The Seventh Circuit acknowledged that the *Parker* v. *Brown* test requires that the City's anticompetitive conduct be authorized by the state pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation or monopoly service. The Seventh Circuit held Wis. Stats. Sections 66.069(2)(c) and 144.97(lm) satisfied this requirement, although neither addresses nor expresses a policy that the City provide these services on a monopoly basis.

In reaching this result, the Seventh Circuit held that the state need not express a policy authorizing the City to displace competition in sewage service with monopoly service. Instead, all that is required is that "the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services" because the Court then "can assume that the State contemplated that anticompetitive effects might result from conduct pursuant to that authorization" and having made that assumption the Court "can infer that it [the state] condones the anticompetitive effect." The Seventh Circuit held this sufficient to meet the "clear articulation and affirmative expression" test of *Parker* v. *Brown*. Appendix A, pp. 8-10.

The Seventh Circuit acknowledged that *California Retail Liquor Dealers Association* v. *Midcal Aluminum* requires "active state supervision" for exemption under the *Parker* v. *Brown* test. The Seventh Circuit held that this holding in *Midcal* only applies to private parties. The Seventh Circuit held municipalities are immune under *Parker* v. *Brown* if they meet the clear articulation and affirmative expression standard even though there is no active state supervision.

REASONS FOR GRANTING THE WRIT

I.

THE TEST ANNOUNCED BY THE SEVENTH CIRCUIT IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT BECAUSE: (1) IT HOLDS STATE NEUTRALITY IS SUFFICIENT TO MEET THE "CLEARLY ARTICULATED AND AFFIRMATIVELY EXPRESSED STATE POLICY" TEST; AND (2) IT HOLDS ACTIVE STATE SUPERVISION IS NOT NECESSARY FOR IMMUNITY FROM THE SHERMAN ACT.

The Seventh Circuit has devised a new test for municipal immunity from the antitrust laws in direct conflict with the letter and spirit of the test announced by this Court. Contrary to this Court's pronouncements, the Seventh Circuit gives municipalities a special status conferring immunity not available to other "persons" subject to the Sherman Act. The Seventh Circuit's test for municipalities has eliminated the "clearly articulated and affirmatively expressed" standard defined by this Court. In its place, the Seventh Circuit accepts state "neutrality", something this Court has expressly rejected. The Seventh Circuit has also eliminated the "active state supervision" requirement. The result of the Seventh Circuit's test is that municipalities are left to make economic choices contrary to the antitrust laws guided solely by their own parochial interests. The Seventh Circuit's test is the antithesis of the policy underlying this Court's decisions creating the limited exemption to the Sherman Act.

A. The decisions of this Court require that before anticompetitive conduct is exempt from the Sherman Act, the conduct: (1) must be pursuant to a clearly articulated and affirmatively expressed state policy to displace competition and that state neutrality is not sufficient; and (2) must be actively supervised by the state.

The Sherman Act prohibits "any person" from monopolizing any part of commerce. 15 U.S.C. Section 2. Recently in *Jefferson County Pharmaceutical Ass'n., Inc.* v. *Abbott Laboratories*, 103 S.Ct. 1011, 1016 (1983), a case applying the Robinson-Patman Act to state purchases, this Court reiterated that the antitrust laws represent

> a carefully studied attempt to bring within [them] every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states

and the "heavy presumption against implicit exemptions" from the antitrust laws. As to municipal exemption, the Court stated:

> In *City of Lafayette, supra*, applying antitrust laws to a city in competition with a private utility, we held that no exemption for local governments would be implied. The Court emphasized the purposes and scope of the antitrust laws: "[T]he economic choices made by public corporations . . . , designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders." [435 U.S. 403. See also *id.* at 408. *Abbott Laboratories, id.* at 1016-17.]

Therefore, cities as well as all other subdivisions of the states are subject to the restraints of the Sherman Act and are no more exempt from the Act than are private

corporations.[1] *Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 394-408 (1978) and *Community Communications Co.* v. *Boulder*, 455 U.S. 40, 50-51 (1982).

On the other hand, the individual states, while acting as sovereign, are not subject to the Sherman Act. *Parker* v. *Brown*, 317 U.S. 341, 350-51 (1943).[2] The fact the Sherman Act does not apply to the states does not enable the states to grant immunity to any other "person" covered by the Act by authorizing them to violate the Act or by declaring their action is lawful.[3] Therefore, it is only anticompetitive conduct attributable to the states which is exempt from the Sherman Act.

This does not mean a state may not implement its own anticompetitive activities through authorized agents acting on its behalf. Under the *Parker* v. *Brown* test, "person[s]" otherwise subject to the Act are exempted from

[1] The same may not be true with respect to remedies available against cities under the Sherman Act or with the determination of whether a particular activity is anticompetitive. *Lafayette*, *supra* at 401-02 and 417 n. 48.

[2] This results from applying the principle of federalism to the fact that nothing in the language or history of the Sherman Act suggests a Congressional intent to restrain a state or its officers and agents from activities directed by its legislature. *Parker*, *id.* Cities are not sovereign under our dual system of government; therefore, the *Parker* v. *Brown* test does not afford any exemption to cities based upon their status as subdivisions of a state. *Boulder*, *supra* at 50-51.

[3] ". . . [A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." *Parker*, *supra* at 351; *California Retail Liquor Dealers* v. *Midcal Aluminum*, 445 U.S. 97, 105 (1980).

its restraints while and to the extent such "person[s]" are acting on behalf of the state at the state's direction or authorization to carry out the state's policy to displace competition with regulation or monopoly service. *Lafayette*, *supra* at 408-17; *Boulder*, *supra* at 52-56. This limited exemption for entities other than states is ". . . simply a recognition that a state may frequently choose to effect its policies through the instrumentality of its cities and towns." *Boulder*, *supra* at 51.

The purpose of the exemption is to avoid restraining the state's sovereign rights by a restraint of the state's agents. *Parker*, *supra* at 350-51. Therefore, while a city may perform anticompetitive acts while acting on behalf of the state at the state's direction pursuant to the state's policy,

> . . . when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their *flelegated* power must obey the antitrust laws. [*Lafayette*, *supra* at 416; *Boulder*, *supra* at 57.]

The Court has devised a single test applicable to both private and public entities claiming to act on behalf of the state. This test furthers the policy of federalism without impairing the goals Congress sought by enacting the Sherman Act. *See Lafayette*, *supra* at 415. This test applies equally to private and public entities because the policy of federalism, *i.e.*, state sovereignty, is not furthered unless the activity in question is attributable to the state acting as sovereign. This is determined by the state's involvement in the activity and not the nature of the person claiming to act on behalf of the state. Likewise, if municipalities were free to make economic choices based solely upon their own parochial interest, "a serious chink in the armor of the antitrust protection would be introduced at

odds with the comprehensive national policy Congress established." *Lafayette*, *supra* at 408. This is so because the economic choices made by public corporations are not more likely to comport with these national policies than those made by private corporations. *Lafayette*, *supra* at 403.

The test devised by this court requires that the state direct or authorize a city or other "person" to act on behalf of the state to carry out the state's policy to displace competition with regulation or monopoly service. *Lafayette*, *supra* at 413. The policy to displace competition must be "clearly articulated and affirmatively expressed" by the state. *Boulder*, *supra* at 54. Further, the policy must be "actively supervised" by the state itself. *Lafayette*, *supra* at 410; *Midcal*, *supra* at 105.

Under this Court's test, a state's neutrality on the matter or the fact that a city's anticompetitive conduct is lawful under state law is not sufficient. *Lafayette*, *supra* at 414-15 and 415 n. 45; *Boulder*, *supra* at 55-56.

> A state that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers granted" since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. [*Boulder*, *supra* at 55.]

Neutrality cannot be the basis for immunity because:

> . . . [I]n the absence of evidence that the State authorized or directed a given municipality to act as it did, the actions of a particular city hardly can be found to be pursuant to "the state['s] command" or to be restraints that "the state . . . as sovereign" imposed. [*Lafayette*, *supra* at 414.]

Therefore, the state must affirmatively address the anticompetitive action and expressly direct or authorize the city to engage in such conduct.

B. The Seventh Circuit's test accepts state neutrality as sufficient for exemption and is in direct conflict with this Court's decisions which expressly reject state neutrality as sufficient.

In this case, the alleged violation of the Sherman Act is monopolization. The City is using monopoly power in one product market to monopolize other product markets. The Towns do not contend that the State of Wisconsin has prohibited the City's monopolization. Rather, the Towns contend that the City is subject to the antitrust laws because the state has neither affirmatively addressed this subject of monopolization nor clearly expressed a state policy that the competition between the City and other providers of services be displaced by monopoly service by the City.

The Seventh Circuit did not find that the state affirmatively addressed this subject and clearly expressed a state policy to displace this competition. Instead, the Seventh Circuit devised a new test for determining exemption, which accepts state neutrality as sufficient. This test is in direct conflict with this Court's express holdings in *Lafayette* and *Boulder*.

The focus of the test announced by this Court is whether there is a state policy to displace competition with regulation or monopoly service. *Lafayette*, *supra* at 413. In the context of this case, the focus is on the existence of a state policy to displace competition in the provision of collection and transportation services in the unincorporated areas surrounding a city with monopoly service. The Seventh Circuit specifically rejected the search for a state

policy to displace competition as relevant. Instead, the Seventh Circuit focused upon the City's right under state law to determine on its own to whom the City would sell treatment services, without regard to whether the state ever affirmatively addressed or expressed a state policy that the competition in collection or transportation services be displaced.[4] This is in direct conflict with this Court's test which makes the existence of a state policy to displace competition determinative.

Since the Seventh Circuit did not focus upon the proper state policy, it did not and could not utilize the "clearly articulated and affirmatively expressed" test required by this Court. Instead, the Seventh Circuit devised a new test. The new Seventh Circuit test is described as follows:

> In this case, if we can determine that the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services, then we can assume that the State contemplated that anticompetitive effects might result from conduct pursuant to that authorization. . . . If the state authorizes certain conduct, we can infer that it condones the anticompetitive effect that is a reasonable or foreseeable consequence of engaging in the authorized activity. [Seventh Circuit Opinion, Appendix A, pp. 8-9.]

The Seventh Circuit's test is that when a state permits a city to sell sewage services and to determine to whom it will sell such services, which authority under some circumstances is capable of being used by the City in an

[4] After rejecting the towns' formulation of the issue, the Seventh Circuit said, "The district court properly focused on determining if authorization for the refusal to provide sewage treatment services exists rather than attempting to find a specific authorization for the monopolizing effect that results from refusing to provide these services." Seventh Circuit Opinion, Appendix A, p. 9.

anticompetitory fashion in violation of the Sherman Act, then the court can *assume* that the state contemplated this anticompetitive activity and can *infer* that the state *condones* it. The Seventh Circuit test: (1) does not require that the state affirmatively address the issue of competition or monopoly service; (2) does not require that the state express a policy to displace competition with monopoly service; and (3) does not require that the state direct or authorize the City to carry out this policy. The Seventh Circuit's test is the embodiment of the concept of "neutrality" expressly rejected by this Court.

In *Boulder, supra* at 57, this Court reaffirmed what it had said in *Lafayette*.

> Today's decision does not threaten the legitimate exercise of governmental power, nor does it preclude municipal government from providing services on a monopoly basis. *Parker* and its progeny make clear that a State properly may . . . direct or authorize its instrumentalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws. . . . [*A*]*ssuming that the municipality is authorized to provide a service on a monopoly basis,* these limitations on municipal action will not hobble the execution of legitimate governmental programs. (Emphasis added.)

In this case, the state has not authorized the City to provide any of the services in question in the unincorporated areas constituting the Towns on a monopoly basis. The state has not even addressed the issue of competition. At best, the state's position, *i.e.*, condoning conduct, is one of neutrality. This Court has expressly held that state neutrality is not sufficient for immunity.

The Seventh Circuit's application of its test to the Wisconsin Statutes proves that its test is in direct conflict with this Court's decisions. The Seventh Circuit relies

solely upon Sections 66.069(2)(c) and 144.07(lm), Wisconsin Statutes, as the clear expression and affirmative articulation of Wisconsin state policy. Neither of these statutes enunciates a state policy in conflict with the policy of the Sherman Act because neither state statute directs or authorizes the City to provide service in the Towns on a monopoly basis. In fact, it is questionable whether either statute deals with the subjects of competition or monopoly service at all.

The Seventh Circuit stated:

> Section 66.069(2)(c) of the Wisconsin Statutes provides that a city may fix the area in which to extend sewage services, and that a city has no obligation to serve beyond that area. [Appendix A, p. 12.][5]

This statute is totally neutral as to whether the City should provide service outside the City limits or under what circumstances it should do so. This statute does not even suggest that the City monopolize services in the Towns. It does not deal with the subject of competition or monopoly service at all. The decision to whom the City will sell services under this statute is left totally in the hands of the City.

The Seventh Circuit stated:

> . . . [S]ection 144.07(lm) of the Wisconsin Statutes provides that the department of natural resources may order a city to extend its sewage system to a town, but if that town then refused to become annexed to the

[5] This statute does not even apply. All the Towns seek is the right to buy treatment service from the City. The Towns acknowledge they will have to deliver the sewage to the City's pipes at the City corporate limits. Therefore, the relief the Towns seek does not require the City to extend sewage service to anyone outside the City limits.

> city, the order becomes void and the city has no obligation to extend the sewerage system. [Appendix A, pp. 12-13.]

Section 144.07(lm) does not authorize the City to provide service in the Towns on a monopoly basis. The statute neither deals with monopoly service nor grants cities any power or authority. The statute deals with the revocation of Department of Natural Resources orders. The statute does not apply to the case because: (1) there is no such order; and (2) no one is asking the City to extend a sewage system into the Towns. Therefore, even if Section 144.07 (lm) granted the City some authority, which it does not do, it does not authorize the City to provide service in the Towns on a monopoly basis.

These statutes do not in any way evidence a state policy that cities provide sewage services in the towns on a monopoly basis, let alone a policy that cities use predatory conduct to eliminate the towns as competitors. At most, these statutes give cities the authority to engage in conduct which may or may not have anticompetitive effects. The cities are therefore free under state law to engage in monopolization of these services in the towns without regard to state policy since the state has not announced any policy. The result of the Seventh Circuit's decision is to permit these cities to engage in anticompetitive conduct guided solely by the dictates of each city's own parochial interests. This is in direct conflict with the policy underlying this Court's decisions in *Lafayette* and *Boulder*.

If the Seventh Circuit's test is applied to the facts in *Boulder*, the result is that the City of Boulder is immune from the Sherman Act. Clearly, Boulder had authority to regulate cable television services provided within the city's corporate limits and to adopt ordinances for that purpose. It is also clear that Boulder could use that au-

thority in an anticompetitive manner, since that is exactly what was alleged in the case. Under the Seventh Circuit's test, the court assumes Colorado contemplated this anti-competitive use of the authority given and condones it. Therefore, under the Seventh Circuit's test, Boulder is immune from the Sherman Act.

This was not the result in *Boulder* because in *Boulder*, as in this case, the state had not created a policy that service (cable television or sewage service) be provided on a monopoly basis. In *Boulder*, as in this case, the anticompetitive nature of the city's conduct was attributable to the city and not the state. The test used by the Seventh Circuit contradicts the test established in *Boulder* and *Lafayette*.

C. The Seventh Circuit's test is in direct conflict with the decisions of this Court because it eliminates the active state supervision requisite established by this Court's decisions.

In *California Retail Liquor Dealers* v. *Midcal Aluminum*, 445 U.S. at 105, this Court, after reviewing its previous decisions defining the *Parker* v. *Brown* test, stated:

> These decisions establish two standards for antitrust immunity under *Parker* v. *Brown*. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410, 55 L.Ed.2d 364, 98 S.Ct. 1123 (1978) (opinion of Brennan, J.).

This Court has established a single test for determining immunity under *Parker* v. *Brown*, regardless of whether the entity claiming immunity was a municipality or other "person" subject to the Sherman Act. While *Midcal* was not a municipality case, the authority cited for this test

in *Midcal*, *i.e.*, *Lafayette*, was. In *Lafayette* and in *Boulder* the Court cited non-municipal cases and used the test formulated in those cases without change. While the Court in *Boulder* did not have to, and therefore did not, reach the "active state supervision" prong of the *Parker* v. *Brown* test, there is no authority in any of this Court's decisions for elimination of this prong of the test.

Since, ". . . a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful", active state supervision is required to assure that the anticompetitive conduct is attributable to the state and not the "person" allegedly acting on behalf of the state. *Midcal*, *supra* at 105-06. This assurance is just as necessary, if not more so, when a municipality is involved rather than a state commission or board.

The Seventh Circuit's reason for eliminating this prong of the test is without merit. The Seventh Circuit reasons that in the case of a municipality:

> Supervision is unnecessary because local governments operate pursuant to clearly articulated and affirmatively expressed restraints imposed by the state in its policies and delegation of authority. [Appendix A, p. 16.]

But all "persons" seeking immunity under *Parker* v. *Brown* must establish they are acting pursuant to a clearly articulated and affirmatively expressed "state policy to displace competition". Therefore, the existence of such policy does not distinguish municipalities from any other "person" claiming immunity under *Parker* v. *Brown*. Nor are municipalities any less likely to make economic decisions based upon their own parochial interests than any other "person" seeking immunity. The teaching of

Lafayette is that municipalities are just as likely to be guided by their parochial interests as private corporations. *Lafayette*, *supra* at 403.

In this case, what restraints are imposed on the City by Sections 66.069(2)(c) and 144.07(lm), Wisconsin Statutes? None. The state has left the City free to do as it pleases. The anticompetitive conduct here is the City's, not the state's. State supervision is necessary to guarantee the anticompetitive conduct is the state's and not merely a "person" claiming to act on behalf of the state. If the restraints of the Sherman Act are removed in this case, the City has carte blanche to use its monopoly power as its parochial interests dictate, unfettered by state or federal policy or law.

II.

THE SEVENTH CIRCUIT'S TEST OF CLEAR ARTICULATION AND AFFIRMATIVE EXPRESSION IS IN DIRECT CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN RONWIN.

In *Ronwin* v. *State Bar of Arizona*, 686 F.2d 692 (9th Cir. 1982), the Ninth Circuit applied the *Parker* v. *Brown* test to a public entity. The state agency involved in *Ronwin* was a "committee" established and appointed by the Arizona Supreme Court.[6] Therefore, the "committee" claiming immunity was a public body or subdivision of the state.[7] The Ninth Circuit stated:

[6] As in *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 360 (1977), the Arizona Supreme Court is the ultimate body wielding the state's power over the practice of law and, therefore, its action in regulating the practice of law is a restraint of the state acting as sovereign.

[7] The "committee" was not a committee of the State Bar.

> . . . Although the defendants in the United States Supreme Court's state-action decisions were public bodies, or subdivisions of the state, that did not end the Court's analysis. The Court still looked to see whether the challenged restraints were clearly articulated and affirmatively expressed as state policy and were actively supervised by the state acting as sovereign. Thus, for instance, it was not dispositive that the restraints challenged in *Parker*, *Orrin W. Fox*, and *Midcal* were enforced, respectively, by a state commission, a state board, and a state department. (Cites omitted.) [*Ronwin*, *supra* at 697.]

The Ninth Circuit stated the committee's failure to meet either the "clearly articulated and affirmatively expressed" standard or the "actively supervised" standard of the *Parker* v. *Brown* test would result in denial of immunity. *Ronwin*, *supra* at 696. The "committee" failed to meet the former; therefore, the latter was not reached.

The challenged activity was that the committee graded the exam to admit a predetermined number of persons without reference to achievement. The committee was delegated the general authority to examine applicants and to grade the tests, but no rule of the Arizona Supreme Court directed or authorized the committee to do so in an anticompetitive fashion. The Court stated:

> . . . we conclude that the challenged grading procedure fails to qualify for antitrust immunity. It has not been established that the alleged restraint was "clearly articulated and affirmatively expressed as state policy," *Midcal's* first requirement. *Id.* Like the defendants in *Goldfarb*, the defendants here have no statute or Supreme Court Rule to point to as directly requiring the challenged grading procedure. [*Ronwin*, *id.*]

If the Seventh Circuit's test is applied to the facts in *Ronwin*, the committee is immune from the Sherman Act. The committee was authorized to determine who was quali-

fied for the bar and who passed the bar exam. It is foreseeable that the committee might use this power in an anti-competitive manner, *i.e.*, only passing a predetermined number of applicants. Therefore, it is assumed the Arizona Supreme Court "condoned" this activity and the committee is immune from the Sherman Act.[8]

The *Ronwin* test for determining immunity for a public entity is in direct conflict with the Seventh Circuit's test. Unlike the Seventh Circuit, the Ninth Circuit applies the same test for all "persons" claiming immunity from the antitrust laws and does not substitute state neutrality for a "clearly articulated and affirmatively expressed" state policy to displace competition.

III.

THE SEVENTH CIRCUIT'S DECISION WILL CREATE THE VERY SERIOUS CHINK IN THE ANTITRUST LAWS WHICH THE BOULDER DECISION AVOIDED.

The concept of state neutrality embodied in the Seventh Circuit's decision is the same as the local autonomy addressed in *Boulder*. It is not the state displacing competition; it is the municipalities, having been left free to do as they please by the state, displacing competition with monopolization. In 1978, there were 2,844 units of local government in Wisconsin: 72 counties, 187 cities, 392 villages, 1,269 towns, 427 school districts and 497 other special districts. State of Wisconsin, *Blue Book*, 1979-80, p. 109. This multiplicity of local units of government in Wisconsin represents but one of the 50 states. The Seventh Circuit's decision would give each of these units a special

[8] "State supervision" is no bar to immunity under the Seventh Circuit test because it is not required by the Seventh Circuit.

status and would let these thousands upon thousands of local units of government free to make economic choices at odds with the comprehensive national policy established by Congress in the antitrust laws.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CLAUDE J. COVELLI

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APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 82-1715

TOWN OF HALLIE, TOWN OF SEYMOUR, TOWN OF UNION and TOWN OF WASHINGTON, Wisconsin townships,
Plaintiffs-Appellants,

v.

CITY OF EAU CLAIRE, a Wisconsin municipal corporation,
Defendant-Appellee.

On appeal from the United States District Court for the Western District of Wisconsin.
No. 80 C 527—*John C. Shabaz*, Judge.

ARGUED OCTOBER 29, 1982—DECIDED FEBRUARY 17, 1983

Before ESCHBACH, *Circuit Judge*, COFFEY, *Circuit Judge*, and WISDOM, *Senior Circuit Judge*.*

WISDOM, *Senior Circuit Judge*. Four towns allege that a city is using a monopoly over sewage treatment services in the relevant geographic market to gain a monopoly in the markets for sewage collection and sewage transportation in violation of the Sherman Act, 15 U.S.C. §1 (1973),

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* Honorable John Minor Wisdom, Senior Circuit Judge for the United States Court of Appeals for the Fifth Circuit sitting by designation.

the Federal Water Pollution Control Act, 33 U.S.C. § 1251 (1978), and a state common law duty of a utility to serve. On appeal, the towns contend that the district court erred in dismissing their claims under the Sherman Act on the ground that the conduct in question falls within the state action immunity doctrine of *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed.2d 315 (1943). We conclude that the conduct in question is exempt from the antitrust laws under *Parker* and *Community Communications Company* v. *City of Boulder*, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982), and we affirm the district court's decision.

I.

The plaintiffs-appellants—Town of Hallie, Town of Seymour, Town of Union, and Town of Washington ("Towns")—are four Wisconsin townships that are adjacent to the City of Eau Claire ("City"). The City used federal funds to build a sewage treatment facility within the city limits, and this sewage treatment facility is the only such facility in the market available to the Towns. As a result, the City enjoys a monopoly in the market for sewage treatment services.[1]

The City has refused to supply sewage treatment services to the Towns. The district court found that the City has provided sewage treatment services to individual landowners in the Towns only if they will agree to become annexed by the City and thereby obtain sewage collection and transportation services from the City. *Town of Hallie* v. *City of Eau Claire*, No. 80-C-527, slip op. at 1 (W. D. Wisc. April 5, 1982). By refusing to provide treatment services to the Towns, the City has prevented the Towns

[1] The disposal of sewage is a three-step process. Sewage must be collected from the user, transported to the treatment facility, and treated and disposed of by the treatment facility. The City's monopoly in this case extends only to the third step.

from competing in the markets for sewage collection and transportation. The Towns simply have no means of disposing of the sewage once they collect and transport it, so they do not collect it at all.

In their complaint seeking injunctive relief, the Towns alleged that the City's denial of sewage treatment services to them violated the Sherman Act, the Federal Water Pollution Control Act, and a common law duty of a utility to serve. The City moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b), and the district court granted the motion. The district court dismissed the antitrust claims on the grounds that the City's conduct was exempt from the Sherman Act under *Parker* v. *Brown*.[2] The district court dismissed the Federal Water Pollution Control Act claim, holding that the Act does not provide a right to sue, that the Towns failed to pursue administrative remedies, and that the Act does not mandate the action that the Towns seek. After dismissing the federal claims, the district court dismissed the pendent state claim.

On appeal, the Towns contest only the denial of their antitrust claims. The Towns contend that the City's conduct is exempt from the Sherman Act only if it is in furtherance of clearly articulated and affirmatively expressed state policy and it is actively supervised by the State of Wisconsin. The Towns contend that state action immunity is unavailable to the City because it has met

[2] The Towns brought their antitrust claims under a number of theories. The first claim was that the City used its monopoly over sewage treatment to gain a monopoly over sewage collection and transportation. The second claim was that requiring the consumer to obtain sewage and collection services in order to gain sewage treatment services constituted an illegal tying arrangement. The third claim was that the City's conduct was an illegal refusal to deal with the Towns.

neither of these two requirements. The City contends that its denial of services to the Towns is authorized by clearly articulated state policy and that state action immunity protects its conduct.

II.

In *Parker* v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), the Supreme Court addressed the issue whether the federal antitrust laws prohibited the State of California from adopting a program that prevented raisin producers from freely marketing their crop in interstate commerce. The Court held that the marketing program was exempt from the antitrust laws by virtue of limitations in the Sherman Act and concepts of federalism:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

317 U.S. at 350-51, 63 S.Ct. at 313, 87 L.Ed. at 326.

The Supreme Court later addressed the question whether the "state action" immunity exemption of *Parker* v. *Brown* was available to a state's municipalities.[3] In *City*

[3] During the period from 1943 to 1975, the Supreme Court did not address the state action immunity question. Since 1975, the Court has addressed the issue of immunity under *Parker* in seven cases. The Court responded to the concern that states and municipalities were sheltering too much conduct that contravened the anti-

(footnote continued)

of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 53 L.Ed.2d 364 (1978),[4] a private utility company brought suit under the Sherman Act against several Louisiana cities empowered to own and operate electric utility systems and alleged that they had committed various antitrust offenses in their operation of their utility systems. A majority of the Court rejected the contention that Congress did not intend the Sherman Act to apply to local governments, and a plurality of the Court stated:

> Cities are not themselves sovereign; they do not receive all the federal deference of the states that create them. Parker's limitation of the exemption to 'official action directed by a state,' is consistent with the fact that the States' subdivisions generally have been treated as equivalents of the States themselves. In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.

435 U.S. at 412-413, 98 S.Ct. at 1136, 55 L.Ed.2d at 382-83. The Court recognized, however, that the state as

(footnote continued)

trust laws, such as restrictive licensing practices, state action serving as a mask for private cartels, and instances of nominal state regulation in which the state took no active role. M. Handler, *Reforming the Antitrust Laws* 59 (1982). There was also the concern that regulated industries control their regulators and that private corporations use the political process to obtain monopoly profits. *See* R. Posner, Economic Analysis of Law 405-07 (2d ed. 1977).

[4] For a discussion of the Court's decision in *City of Lafayette*, see Areeda, *Antitrust Immunity for "State Action" After* Lafayette, 95 Harv.L.Rev. 435 (1981) [hereinafter "Antitrust Immunity"].

sovereign might sanction anticompetitive activity by the municipalities and immunize this activity from antitrust liability.[5] The Court concluded that "the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." *Id.* at 413, 98 S.Ct. at 1137, 55 L.Ed.2d at 383.[6]

The Supreme Court returned to the issue of state action immunity for municipalities in *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 102

[5] The Court recognized that municipal corporations are instrumentalities of the state for the convenient administration of government and that a state may choose to effect its policies through the instrumentality of its cities and towns. *City of Lafayette*, 435 U.S. at 413, 98 S.Ct. at 1137, 55 L.Ed.2d at 383. *See Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 51, 102 S.Ct. 835, 840, 70 L.Ed.2d 810, 819 (1981).

[6] The Court in *City of Lafayette* reviewed a series of opinions dealing with the *Parker* exemption. The Court discussed *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), which held that the antitrust laws did not apply to a ban on attorney advertising directly imposed by the Arizona Supreme Court. The Court emphasized that the state policy at issue in *Bates* was part of a comprehensive regulatory system, was clearly articulated and affirmatively expressed as state policy, and was actively supervised by the Arizona Supreme Court. *City of Lafayette*, 435 U.S. at 410, 98 S.Ct. at 1135, 55 L.Ed.2d at 381. The Supreme Court in later cases has focused on the language requiring a "clearly articulated and affirmatively expressed state policy" and "active state supervision" in formulating the test to determine if conduct by governmental entities falls within the *Parker* exemption. *See Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982); *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980).

S.Ct. 835, 70 L.Ed.2d 810 (1982).[7] The Court addressed the question whether the *Parker* immunity extended to a "home rule" municipality that was granted extensive powers in local and municipal matters by the state constitution. The Court concluded that the restraint in question, a moratorium on the expansion of cable television enacted by the City Council of Boulder,[8] could not be exempt from antitrust scrutiny unless it constituted the action of the State of Colorado itself in its sovereign capacity or municipal action in furtherance of clearly articulated and affirmatively expressed state policy. The Court held that the guarantee of local autonomy to municipalities through the Home Rule Amendment to the Colorado Constitution did not constitute the "clear articulation and affirmative expression" of state policy

[7] Between the decisions of *Lafayette* and *Boulder*, the Supreme Court addressed the issue of state action immunity in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). The State of California by statute required that wine suppliers set dealer resale prices and that dealers sell at those prices. The Court held that two standards must be met if this anticompetitive conduct were to receive antitrust immunity under *Parker* v. *Brown*. The challenged conduct must be one clearly articulated and affirmatively expressed as a state policy, and it must be actively supervised by the state. The Court struck down the statutory resale price maintenance scheme because there was no active state supervision over the private parties that were given the power to set prices under the statute. *Id.* at 105-106, 100 S.Ct. at 943, 63 L.Ed.2d at 243.

[8] The City has enacted a moratorium on the expansion of cable television enterprises for a period of three months to give the City Council time to draft a model cable television ordinance and to invite new businesses to enter the market. The only existing cable television company in Boulder, Community Communications, sought injunctive relief to prevent the ordinance enacting the moratorium from taking effect.

necessary for anticompetitive conduct to be protected under *Parker*. The Court found that the Home Rule Amendment was neutral with respect to the challenged activity and rejected the City's contention that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances.

III.

The issue before the Court is to determine if the refusal of the City of Eau Claire to provide sewage treatment facilities to the Towns falls within the protection of *Parker* v. *Brown* as interpreted in *City of Lafayette* and *City of Boulder*. The holdings of these cases require that municipalities act pursuant to a clearly articulated and affirmatively expressed state policy. Before determining if such a state policy exists, we must resolve two preliminary issues.

First, the Towns contend that the conduct which must be pursuant to state policy is the City's use of monopoly power in sewage treatment services to monopolize sewage collection and transportation. The Towns argue that the district court erred in characterizing the anticompetitive conduct which must be pursuant to state policy as "the City's decision to provide sewage treatment services to the Towns if and only if they also permit the City to provide sewage collection and transportation services via annexation." According to the Towns, the City must point to a state policy authorizing the City's use of monopoly power over sewage treatment to gain monopolies in sewage collection and transportation.

We reject the Towns' argument that the authorization of the anticompetitive conduct complained of must be as specific as they request. In *City of Lafayette*, the Court rejected the position "that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it may properly assert a *Parker* defense to an antitrust suit," and the Court went on to state that an adequate state mandate exists when it is found "from the authority given a city to operate in a particular area that the legislature contemplated the kind of action complained of". 435 U.S. at 415, 98 S.Ct. at 1138, 55 L.Ed.2d at 384. In this case, if we can determine that the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services, then we can assume that the State contemplated that anticompetitive effects might result from conduct pursuant to that authorization.[9] The district court properly focused on determining if authorization for the refusal to provide sewage treatment services exists rather than attempting to find a specific authorization for the monopolizing effect that results from refusing to provide these services. If the state authorizes certain conduct, we can infer that it condones the anticompetitive effect that is a reasonable or foreseeable consequence of engaging in the authorized activity.[10]

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[9] *See Antitrust Immunity*, 95 Harv. L. Rev. at 445-46 (1981): "The Supreme Court has found it sufficient that 'the legislature contemplated the kind of action complained of'. A policy to displace antitrust laws will then be inferred if the challenged restraint of competition is a necessary or reasonable consequence of engaging in the authorized activity." *Id.* (quoting *City of Lafayette*, 435 U.S. at 415, 98 S.Ct. at 1138, 55 L.Ed.2d at 384).

[10] *See* P. Areeda, *Antitrust Law* § 212.3a, at 53-54 & n.8 (Supp. 1982) ("The courts have recognized that state statutes need not confer authorization expressly. It would be sufficient, the Supreme Court said, that 'the legislature contemplated the kind of action complained of.' A policy to displace the antitrust laws will then be found if the challenged restraint of competition is a necessary consequence of engaging in the authorized activity.").

The second preliminary issue is the contention of the Towns that the City must point to a state policy *directing* or *compelling* the challenged conduct to gain *Parker* protection. There has been a great deal of confusion over whether the state must compel a municipality to undertake an anticompetitive activity in order to receive immunity under *Parker*. This confusion arose because of language in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 791, 95 S.Ct. 2004, 2015, 44 L.Ed. 572, 587 (1975), and *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 600, 96 S.Ct. 3110, 3122, 49 L.Ed.2d 1141, 1155 (1976), which appeared to require state compulsion as a prerequisite for municipal immunity. We conclude that state compulsion is not required. It is clear in *City of Lafayette* and *City of Boulder* that the only immunity available to municipalities is that derived from the immunity granted to the states in *Parker*. The critical inquiry is to determine if the anticompetitive conduct undertaken by a municipality constitutes state action. We hold that any municipality acting pursuant to clearly articulated and affirmatively expressed state policy which evidences an intent of the legislature to displace competition with regulation—whether compelled, directed, authorized, or in the form of a prohibition—is entitled to antitrust immunity because conduct pursuant to such a policy would constitute state action.

Recent Supreme Court cases support our conclusion that compulsion is not required. The Court in *City of Boulder* and *City of Lafayette* explained that a state must

only authorize the municipal activity for the *Parker* exemption to apply,[11] and many commentators have rejected the notion that compulsion is required.[12] Obviously, if the state compels or directs a municipality to undertake anticompetitive conduct, this compulsion or direction is strong evidence of a state policy to displace the antitrust laws. We hold that the City must show only that

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[11] The court stated in *City of Boulder*:

> Moreover, judicial enforcement of Congress' will regarding the state action exemption renders a state "no less able to allocate governmental power between itself and its political subdivisions. It means only that when the State itself has not directed *or authorized* an anticompetitive practice, the State's subdivision in exercising their delegated power must obey the antitrust laws."

455 U.S. at 56-57, 102 S.Ct. at 843, 70 L.Ed.2d at 822 (citations omitted) (emphasis supplied).

In *City of Lafayette*, the Court stated:

> Today's decision does not threaten the legitimate exercise of governmental power, nor does it preclude municipal government from providing services on a monopoly basis. Parker and its progeny make clear that a State properly may . . . direct *or authorize* its instrumentalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws.

435 U.S. at 416-17, 98 S.Ct. at 1138, 55 L.Ed.2d at 385 (emphasis supplied), *quoted in City of Boulder*, 455 U.S. at 57, 102 S.Ct. at 844, 70 L.Ed.2d at 822.

[12] *See* P. Areeda, *Antitrust Law* § 212.5 (Supp. 1982); M. Handler, *Reforming the Antitrust Laws* 64-65 (1982); *Antitrust Immunity*, 95 Harv.L.Rev. at 445 ("*Lafayette* does not require that governmental acts be compelled or supervised by the state. Rather, it demands that the legislature have *authorized* the challenged activity with an intent to displace the antitrust laws.") (emphasis supplied); Page, *Antitrust Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After* Midcal Aluminum, 61 B.U.L. Rev. 1099, 1122 n.141 (1981).

clearly articulated and affirmatively expressed state policy authorizes the City's refusal to provide sewage treatment to the Towns to gain the state action immunity of *Parker*.

IV.

The Towns contend that the City's refusal to extend sewer services to them is not pursuant to clearly articulated and affirmatively expressed state policy. We disagree. Several statutes and court decisions interpreting those statutes give the City authority to decide where to extend sewer services and to insist on annexation as a condition to extending sewer services to the surrounding area.

Section 66.069(2)(c) of the Wisconsin Statutes provides that a city may fix the area in which to extend sewage services, and that a city has no obligation to serve beyond that area.[13] This statute authorizes the City to fix the limits of its utility service and expressly provides that the City "shall have no obligation to serve beyond the area so delineated." In addition, section 144.07(lm) of the Wisconsin Statutes provides that the department of natural resources may order a city to extend its sewerage system to a town, but if that town then refused to become

[13] Section 66.069(2)(c) provides:

> Notwithstanding § 196.58(5), each village or city may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated. Such area may be enlarged by a subsequent ordinance. No such ordinance shall be effective to limit any obligation to serve which may have existed at the time the ordinance was adopted.

We note that § 66.069(2)(c) applies to water utilities. Its provisions, however, are incorporated into the statute governing municipal sewage systems by § 66.076(8).

annexed to the city, the order becomes void and the city has no obligation to extend the sewerage system.[14] This statute is evidence of a state policy to require annexation as a condition to receiving municipal services.

Our conclusion that state policy authorizes the City to refuse sewage treatment services unless the purchaser becomes annexed is strengthened by the holding of *Town of Hallie* v. *City of Chippewa Falls*, 105 Wis.2d 533, 314 N.W.2d 321 (1982). The Town of Hallie brought suit against Chippewa Falls under the state antitrust laws for the refusal of Chippewa Falls to provide sewage treatment facilities to the Town of Hallie unless the Town agreed to obtain other municipal services from Chippewa Falls. When the Town did not agree, the City annexed a portion of the Town. The court relied on the broad home

[14] Section 144.07 provides:

> An order by the department for the connection of unincorporated territory to a city or village system or plant shall not become effective for 30 days following issuance. Within 30 days following issuance of the order, the governing body of a city or village subject to an order under this section may commence an annexation proceeding under § 66.024 to annex the unincorporated territory subject to the order. If the result of the referendum under § 66.024(4) is in favor of annexation, the territory shall be annexed to the city or village for all purposes, and sewerage service shall be extended to the territory subject to the order. If an application for an annexation referendum under § 66.024(4) is against the annexation, the order shall be void. If an annexation proceeding is not commenced within the 90-day period, the order shall be effective.

The constitutionality of § 144.07(lm) was upheld in *City of Beloit* v. *Kallas*, 76 Wis.2d 61, 250 N.W.2d 342 (1977). The court held the statute balanced and accommodated two matters of state concern: providing vital services to areas surrounding cities and the growth or expansion of cities or villages, with annexation as a means to bring all municipal services to areas annexed.

rule provisions under Wisconsin law and §§ 66.029(2)(c) and 144.07(lm) to hold that state antitrust law did not apply to this conduct. The court stated:

> Although the statutes do not specifically so provide, it seems that the legislature viewed annexation by the city of a surrounding unincorporated area as a reasonable quid pro quo that a city could require before extending sewer services to the area. . . .
>
> While the facts of the present case are clearly not covered by this statute because no DNR order is involved, [sec. 144.07(lm)] is still helpful in indicating that the legislature seems to view annexation as an appropriate prerequisite to the provision of sewage service outside the limits of a city. This seems reasonable because establishing and maintaining sewage treatment facilities can be a very substantial financial burden upon the city taxpayers and residents. If an area is to have the benefit of such services, it may be appropriate for it to be annexed in order to add to the city's tax base and help pay for the cost of providing such services.

314 N.W.2d at 325-26.

The *Town of Hallie* decision and the statutes that it interprets show that there is a clearly articulated and affirmatively expressed state policy not to burden municipalities with providing services unless they can annex the territory that they service. The City acted pursuant to and in a manner consistent with this policy by refusing to provide sewage treatment services to the Towns unless they agreed to become annexed and acquire the full range of sewage services. We hold that the conduct of the City in refusing to provide these services meets the standards of the *City of Boulder* requiring that the anticompetitive conduct was in furtherance of clearly articulated and affirmatively expressed state policy.

V.

The Towns contend that the State of Wisconsin must actively supervise the anticompetitive conduct for the City to gain the protection of *Parker* v. *Brown*. The "active state supervision" requirement arose in *California Retail Liquor Dealers Association* v. *Midcal Aluminum*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). *Midcal* involved a California statutory scheme allowing private wine suppliers to establish a program of resale price control to be enforced by the state. The State of California neither established nor reviewed the prices set by these private decision makers. The Supreme Court struck down the state law because it created a private price-setting mechanism that the state did not supervise. The Court concluded, "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 445 U.S. at 106, 100 S.Ct. at 943, 63 L.Ed.2d 243.

We do not conclude that *Midcal* requires active state supervision over the conduct in this case.[15] The *Midcal*

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[15] In the *City of Boulder*, the Supreme Court left open the question whether a municipality must show active state supervision over its conduct in order to receive immunity under *Parker* v. *Brown*: "Because we conclude in the present case that Boulder's moratorium ordinance does not satisfy the 'clear articulation and affirmative expression' criterion, we do not reach the question whether that ordinance must or could satisfy the 'active state supervision' test focused upon in *Midcal*." *City of Boulder*, 455 U.S. at 51 n.14, 102 S.Ct. at 841 n.14, 70 L.Ed.2d at 819 n.14.

In *Pueblo Aircraft Service* v. *City of Pueblo*, 679 F.2d 805 (10 Cir. 1982), the Court did not require active state supervision for the City of Pueblo to receive *Parker* v. *Brown* immunity. The conduct in this case involved the City's operation of a municipal airport. The Court concluded that the key inquiry was whether the State of Colorado by affirmative legislative action granted the City

(footnote continued)

case involved private parties that were given power over price and that were free of state supervision. In this context, the requirement of active state supervision ensures that the private parties not abuse the anticompetitive power given to them and act pursuant to the state policy at stake. This case involves a local government performing a traditional municipal function. Supervision is unnecessary because local governments operate pursuant to clearly articulated and affirmatively expressed restraints imposed by the state in its policies and delegation of authority. If the conduct of local government in providing municipal services is authorized by the state and is clearly articulated and affirmatively expressed as state policy, the activity is state action and entitled to immunity even though state supervision does not exist.[16]

(footnote continued)
an exemption from the operation of the antitrust laws by virtue of statutory language giving municipalities the authority to acquire and operate a municipal airport. Under this standard, the Court held the City's conduct to be exempt from the antitrust laws.

[16] See P. Areeda, *Antitrust Law* § 212.2a, at 47 (Supp. 1982) ("Thus, requiring state authorization for local conduct is analogous to requiring active supervision of private conduct; it tests whether challenged local activity is truly state action and therefore entitled to immunity."); *Antitrust Immunity*, 95 Harv. L. Rev. at 445 & n.49 ("*Lafayette* does not require that government acts . . . be supervised by the state.") ("a few courts erroneously appear to use the *Midcal* formula (clearly articulated state policy plus active public supervision of *private* parties) to require state supervision of governmental defendants"); Rogers, *Municipal Antitrust Liability in a Federalist System*, 1980 Ariz. St. L. J. 305, 340-342 ("It is questionable whether a showing of active state supervision is necessary for political subdivisions to gain *Parker* immunity, however, in spite of the seemingly unequivocal language of *California Retail Liquor*."). For an argument that the Supreme Court should abandon the active state supervision requirement completely, see Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After* Midcal Aluminum, 61 B.U.L.Rev. 1099 (1981).

We also conclude that requiring active state supervision over a traditional municipal function would be unwise. A requirement of active state supervision would erode the concept of local autonomy and home rule authority which is expressed in the statutes and constitution of Wisconsin. States would be required to supervise all local actions if municipalities are to avoid antitrust exposure, and courts would have to make the difficult determination of what "active" supervision is in terms of frequency and effectiveness.[17] We doubt that the Court in *Midcal* intended that the states spend their limited resources actively supervising the traditional governmental functions of their municipalities so that they can avoid antitrust liability.

We hold, therefore, that a state is not held to the high standard of active supervision of the conduct of a city performing a traditional municipal function for that city to receive *Parker* v. *Brown* immunity.[18] The only re-

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[17] *See City of Boulder*, 455 U.S. at 71 n.6, 102 S.Ct. at 851 n.6, 70 L.Ed.2d at 831 n.6 (Rehnquist, J., dissenting) ("The Court understandably avoids determining whether local ordinances must satisfy the 'active state supervision' prong of the *Midcal* test. It would seem rather odd to require municipal ordinances to be enforced by the State rather than the city itself.")

[18] We reserve the question whether a municipality undertaking anticompetitive activity that falls outside the scope of a traditional governmental function must be actively supervised by the state to receive *Parker* v. *Brown* immunity. This reflects our belief that traditional municipal activity undertaken pursuant to clearly articulated and affirmatively expressed state policy and designed to promote public health and safety should be free from antitrust attack. When municipal activity strays from these functions, which includes the provision of basic services such as sewerage and sanitation, there is a more significant threat to free competition that may warrant active state supervision. *See The Supreme Court, 1981 Term*, 96 Harv.L.Rev. 62, 171-273 (1982).

quirement for receiving immunity when a traditional municipal function is involved is that the challenged restraint must be in furtherance or implementation of clearly articulated and affirmatively expressed state policy. We do not question the holding of *Midcal*, but we conclude that the Court's concerns with the private price-fixing arrangement in that case are not present when local governments created by state law carry out governmental functions pursuant to clearly articulated and affirmatively expressed state policy.

VI.

Our examination of Wisconsin statutes and case law reveals that the challenged conduct is in furtherance of a clearly articulated and affirmatively expressed state policy. On the facts of this case, we conclude that the City must make no other showing to be entitled to immunity under *Parker* v. *Brown*. We hold that the district court properly dismissed the antitrust counts against the City, and we affirm the judgment of the district court.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TOWN OF HALLIE, TOWN OF SEYMOUR, TOWN OF UNION and TOWN OF WASHINGTON,

Plaintiffs,

v.

CITY OF EAU CLAIRE,

Defendant.

DECISION AND ORDER
80-C-527
(Dated April 5, 1982)

Plaintiffs Town of Hallie, Town of Seymour, Town of Union and Town of Washington [Towns] filed this action against defendant City of Eau Claire [City]. The Towns are located directly adjacent to the City. They charge the City with illegally exploiting its monopoly power in sewage treatment to extract profits in sewage collection and transportation. The Towns also assert a claim under the Federal Water Pollution Control Act, as well as a pendent state claim.

The City has filed a motion to dismiss. The motion is granted.

FACTS

For the purposes of this motion, the following allegations in the complaint are accepted as true:

1. Sewage treatment is a three-step process. First, the sewage must be collected from the "user," presumably

a residence or business. Next, the sewage must be transported to a treatment facility. Finally, the raw sewage must be treated and disposed of by the treatment facility.

2. The City is the only entity in the market available to the Towns that has a sewage treatment center. As a result, the City enjoys a monopoly in the market for sewage treatment services.

3. The Towns are potential competitors of the City for the sale of sewage collection and transportation services in the same market.

4. The sale of sewage collection, transportation and treatment services has a substantial impact on interstate commerce.

5. The City used federal funds to construct its sewage treatment service facility.

6. The City has refused to supply sewage treatment services to the Towns. The City has provided such services to individual land owners in the Towns if and only if the owners agree that the City will also provide sewage collection and transportation services by requiring annexation of the owner's land to the City.

OPINION

Counts One Through Four

These counts arise under the Sherman Anti-Trust Act, 15 U.S.C. § 1, *et seq.* In Count One, plaintiffs allege that the City attempted to, and did, acquire a monopoly in sewage treatment services. Count Two alleges that the City has "tied" the provision of sewage treatment services to the provision of collection and transportation services. Count Three alleges an illegal refusal to deal with the Towns. Count Four alleges that the City's conduct has prevented the competition in the market for sewage collection and transportation services.

Defendant has filed a motion to dismiss these counts, asserting several justifications. The Court will address only one of these. The Court agrees that defendant's actions as alleged in the complaint are exempt from the federal antitrust laws. Thus, these counts must be dismissed.

Parker v. *Brown*, 317 U.S. 341 (1943), first defined the exemption applicable to the City's conduct. *Parker* held that a state agricultural proration program was not within the intended scope of the Sherman Act:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.

Id. at 350-51.

In January, the Supreme Court further explained the *Parker* doctrine (that state action is not subject to the Sherman Act) in *Community Communications Company* v. *City of Boulder*, 50 U.S.L.W. 4144 (January 12, 1982). The City of Boulder had granted a twenty year permit to conduct a cable television business. Plaintiff was assigned the permit in 1966. Plaintiff wished to take advantage of new technology, and, in May, 1979, informed the City Council that it planned to expand its business. Another cable company expressed interest in providing a competing cable television service in Boulder. Boulder responded by enacting an "emergency" ordinance, prohibiting plaintiff from expanding its business for three months. Plaintiff filed suit, claiming a violation of § 1 of the Sherman Act. Boulder argued that it was immune from antitrust violations because of the *Parker* doctrine. The Supreme Court disagreed. *Id.* at 4144-4145.

Justice Brennan, writing for the Court, summarized the appropriate legal test for Sherman Act exemption for a municipality:

> Boulder's moratorium ordinance cannot be exempt from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity, [cite omitted], or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy, [cites omitted].

Id. at 4146-47.

Justice Brennan first disposed of the argument that Colorado's Home Rule Amendment is a direct delegation of state power to the municipality, thereby immunizing it from antitrust liability under the *Parker* doctrine. "Ours is a '*dual* system of government,' *Parker, Supra,* at 351 (emphasis added), which has no place for sovereign cities."

Then, Justice Brennan rejected Boulder's argument that the Colorado Home Rule Amendment's "guarantee of local autonomy" constitutes a "clearly articulated and affirmatively expressed state policy" that justifies the Boulder ordinance.

> But plainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitve. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers *granted,*" since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here. The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality.
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> Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances--would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require.

Id. at 4147-48.

Because Boulder failed to establish that Home Rule powers alone establish that its ordinance furthered or implemented a clearly articulated and affirmatively expressed state policy, the Court did not address the second requirement for exemption from the Sherman Act by municipalities—that the state actively supervise the city's action. *Id.* at 4146, n. 14.

The second requirement was most recently articulated in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum*, 445 U.S. 97 (1980). In *Midcal*, an anticompetitive state program for resale price maintenance of wine met the first criteria of the *Parker* doctrine—the state "legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance." *Id.* at 105.

The state program failed, however, to meet the second requirement for exemption from Sherman Act coverage—that the policy is actively supervised by the state. In this case, the

> State simply authorized price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program. (Footnote omitted). The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state in-

> volvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." 317 U.S., at 351.

Id. at 105-106

The first issue before the Court, then, is whether the City's decision to provide sewage treatment services to the Towns if and only if they also permit the City to provide sewage collection and transportation services via annexation constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy. The Court holds that it does.

The City correctly identifies a number of statutes which together indicate state sanction and approval of the City's allegedly anticompetitive policy. Individually, the statutes are sufficient. But, viewed together, the statutes justify this assessment by the Wisconsin Supreme Court in a case brought under state antitrust law:

> [I]t seems that the legislature viewed annexation by the city of a surrounding unincorporated area as a reasonable quid pro quo that a city could require before extending sewer services to the area.

Town of Hallie v. City of Chippewa Falls, 314 N.W.2d 321, 325 (Wis. 1982).[1]

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[1] This Court does not rely upon the *Town of Hallie* opinion in this case, which arises under federal antitrust law and presents issues of federalism not present in the state case.

First, the legislature provided that the city may fix the limits of municipal services and that the city shall have no obligation to serve areas outside the city.

> Notwithstanding s. 196.58(5), each village or city may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated. Such area may be enlarged by a subsequent ordinance. No such ordinance shall be effective to limit any obligation to serve which may have existed at the time the ordinance was adopted.

Wis. Stat. § 66.069(2)(c). A separate section specifically provided that § 66.069 shall apply to management of a sewage system, Wis. Stat. § 66.076(8). Furthermore, as the City points out, Wis. Stat. § 62.18(1) grants cities the right to build sewers and limit the areas served.

More significant is Wis. Stat. § 144.07. In subsection (lm), the legislature provided that the Wisconsin Department of Natural Resources (DNR) may order a city to connect its sewers to unincorporated areas surrounding the city. If the DNR so orders, the city may annex the unincorporated territory, subject to a referendum by the residents of the territory to be annexed. If the residents of the territory refused to become annexed, the city has no obligation to provide sewer services. This is a clear manifestation of a state policy that a municipality may condition the provision of sewer services on annexation.

The next issue is whether this policy is actively supervised by the state. The Court is satisfied that Wisconsin statutes provide sufficient supervision of the challenged practice to satisfy this requirement.

First, Wis. Stat. § 144.04 requires each city proposing a sewer extension submit a plan to DNR. The city may not extend its sewers without DNR approval. Additionally, DNR may order construction of a municipal sewer system. Wis. Stat. § 144.025(2)(r). Furthermore, DNR may order a city to extend its sewer services extraterritorially, under limited circumstances. Wis. Stat. § 144.07(1).

In addition, Wisconsin has direct supervision over annexations. Before any city may annex, it must consider state advice as to whether annexation is against the public interest. Wis. Stat. § 66.021. See also Wis. Stat. § 66.021 (11)(c)1, requiring the state to consider which government entity could best supply the area to be annexed with governmental services. Finally, Wisconsin courts may invalidate an annexation if the annexation does not meet a rule of reason. *See Town of Pleasant Prairie* v. *City of Kenosha,* 75 Wis.2d 322, 249 N.W.2d 581 (1977).

Because the City's conduct furthers a clearly articulated and affirmatively expressed state policy, and because the state actively supervises annexation, the City enjoys *Parker* immunity from the Sherman Act. Therefore, these counts must be dismissed.

Count Five

In a separate count, plaintiffs assert that defendant City received federal funds under the Federal Water Pollution Control Act [FWPCA], that the City is required by FWPCA to provide sewage treatment to Towns on a reasonable and just basis, and that the City is not providing these services on such a basis. Defendant has also moved to dismiss this count. The motion is granted.

After a review of FWPCA, 33 U.S.C. § 1281 *et seq.*, the Court cannot find justification for this claim. First, the Towns have not cited, nor is the Court aware of, a provision in the FWPCA authorizing such a suit by "participants" against an uncooperative "applicant."

Furthermore, the Court doubts that this count is ripe for trial. The entire FWPCA contemplates management and implementation by the Environmental Protection Agency [EPA]. 33 U.S.C. § 1281. The Towns have not indicated whether they have pursued their remedy with EPA before seeking the review by this Court.

Finally, the Court can find no mandate to provide services to the Towns in 33 U.S.C. §1284(b)(1), cited by the Towns.

Count Six

The Towns also assert that the City has a duty to provide sewage treatment to the Towns because the sewage treatment facility has "the nature of a public utility." This is a claim arising under state law. Because all federal claims have been dismissed, Count Six must be dismissed as well. *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1955).

ORDER

IT IS ORDERED that defendant's motion to dismiss is GRANTED.

Entered this 26th day of March, 1982.

BY THE COURT:
/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

APPENDIX C

JUDGMENT ON DECISION BY THE COURT
UNITED STATES DISTRICT COURT
For The
WESTERN DISTRICT OF WISCONSIN
CIVIL ACTION FILE NO. 80-C-527

TOWN OF HALLIE, et al,

Plaintiffs,

v.

CITY OF EAU CLAIRE,

Defendant.

JUDGMENT

This action came on for consideration before the Court, Honorable John Shabaz, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that defendant's motion to dismiss is granted with costs.

Dated at Madison, Wisconsin, this 5th day of April, 1982.

/s/ Joseph W. Skupniewitz
Clerk of Court

APPENDIX D

15 U.S.C. Section 2

§2 Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Wisconsin Statutes Section 66.069.(2)(c)

Notwithstanding s. 196.58(5), each village or city may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated. Such area may be enlarged by a subsequent ordinance. No such ordinance shall be effective to limit any obligation to serve which may have existed at the time the ordinance was adopted.

Wisconsin Statutes Section 144.07(lm)

An order by the department for the connection of unincorporated territory to a city or village system or plant under this section shall not become effective for 30 days following issuance. Within 30 days following issuance of the order, the governing body of a city or village subject

to an order under this section may commence an annexation proceeding under s. 66.024 to annex the unincorporated territory subject to the order. If the result of the referendum under s. 66.024(4) is in favor of annexation, the territory shall be annexed to the city or village for all purposes, and sewerage service shall be extended to the territory subject to the order. If an application for an annexation referendum is denied under s. 66.024(2) or the referendum under s. 66.024(4) is against the annexation, the order shall be void. If an annexation proceeding is not commenced within the 30-day period, the order shall become effective.